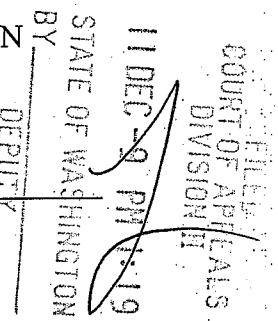
NO. 41556-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II



STATE OF WASHINGTON,

Respondent,

v.

DANIEL MARSHALL AGUIRRE,

Appellant.

SUPPLEMENTAL REFERENCE HEARING BRIEF

Sheryl Gordon McCloud
710 Cherry St.
Seattle, WA 98104-1925
(206) 224-8777
Attorney for Appellant
Daniel Aguirre

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

FEDERAL CASES

STATE STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

Mr. Aguirre was charged with two counts of second-degree assault, one with a deadly weapon, and one count of second-degree rape. The rape charge carried a determinate-plus sentence with a mandatory maximum term of life imprisonment. The state made a pre-trial offer that if Aguirre pled guilty to one count of second-degree assault and one count of third-degree rape, resulting in a standard range of 12-14 months, then the state would recommend 14 months and plead no aggravating factors that could raise the sentence above the standard range. According to Mr. Aguirre, that plea offer was never transmitted to him and if it had been transmitted – along with adequate advice – he would have accepted it to avoid exposure to life in prison. According to defense counsel Mr. Steele, that offer was transmitted and Mr. Aguirre turned it down. This Court remanded to the Superior Court for a reference hearing on this issue.

At the reference hearing, Mr. Aguirre testified that his lawyer, Mr. Steele, never presented this offer to him and that if he had received and understood this offer, he would have accepted it. Aguirre's testimony on this point was bolstered by defense counsel's inability to remember any specific meeting at which he transmitted this offer, by the jail's visitation records which show that no attorney-client meeting (other than a 3-minute visit on the last day the offer was open) was documented during the

relevant time period, and by Aguirre's letter to Steele during the relevant time period stating that he would take any reasonable offer that his lawyer could get. In contrast, defense counsel testified that he did not remember a specific meeting in which he transmitted the offer but that the circumstances convince him that he did so, and did so adequately. He consistently testified, however, that he would have advised Aguirre that the maximum sentence he could receive following trial was the top of the SRA standard range – nothing more. The reference hearing judge agreed with that legal conclusion and ruled that Aguirre's real sentencing exposure at trial was a term of years within the standard range, not life. This formed the basis for his conclusions that Steele adequately transmitted and explained the plea offer, that it was not Steele's fault if Aguirre didn't understand it, and that he didn't need an expert to help him understand determinate-plus sentencing. Section II.

The issues posed by these rulings are summarized in Section III.

The first issue is whether the judge correctly characterized Aguirre's sentencing exposure as the SRA standard range, rather than life. This is a conclusion of law, reviewed *de novo*. It is incorrect under any standard of review; Aguirre was exposed to, and received, a mandatory maximum sentence of life. Section IV(A).

The next issue concerns the judge's ruling that defense counsel

adequately explained the plea offer. The judge's legal error about the maximum sentence made his conclusion about the adequacy of defense counsel's advice incorrect. Section IV(B).

Perhaps the reason that the reference hearing judge erred was that he excluded the testimony of the defense-proffered attorney expert on the standard of practice for criminal defense lawyers in determinate-plus sentencing cases. This ruling is reviewed for abuse of discretion. But it is an abuse of discretion to exclude a proposed expert who is qualified, provides a sufficient offer of proof, and offers evidence that might aid the factfinder. Given the factfinder's error on this specific point, exclusion of this testimony was an abuse of discretion. Section IV(C).

The final issue concerns the legal conclusion that, based on these factual findings, defense trial counsel did adequately transmit the 14-month plea offer to Mr. Aguirre. Section IV(D).

II. THE REFERENCE HEARING EVIDENCE

A. Mr. Aguirre's Memory

Mr. Aguirre testified that his attorney never conveyed the 14-month plea offer to him and never conveyed the fact that he faced a maximum of life if he rejected the offer and lost at trial. VRP: 72-76. Aguirre said Steele told him that if convicted following trial, he faced a range in which the judge had "wiggle room," but it would be in the 70-

month range. VRP:66. He also testified that he would have taken such a deal if he had known it was offered and if he had known that his real exposure at trial was life in prison.[1]

Aguirre's testimony was corroborated by his handwritten letter to Steele, while the offer was pending, stating: "So just know if you get a deal sometime between now and trial and you feel its [sic] in my best intrest [sic] to take it, I will." VRP:150-151; Ex. 17 (attached as Appendix A).

It was corroborated by his mother, who testified that she is very close with Daniel but Daniel told her neither about the plea offer nor that he faced a maximum of life in prison if he rejected a plea. VRP: 35-44.

It was also corroborated by jail records (Aguirre was in jail when the offer was pending, that is, Nov. 17-30, 2006). The jail's records of attorney visits showed that Aguirre received no visits from Steele during this period of time until just before the close of business of Nov. 30.[2] The significance of this is summarized in Ex. 15, attached as Appendix B. Those records, and that chart, show that Aguirre was out of his cell for only 6 minutes for an attorney visit with Steele during the pendency of the

[1] VRP:88 ("I would have sat and thought about it. I would have contacted my parents, asked them about it, and, ultimately, I would have took it.").

[2] Exs. 11, 14 (jail logs of visitation and internal jail movements covering the period November 17-30, 2006); Ex. 15 (chart summarizing all jail visits to Mr. Aguirre during that time); VRP:28 (defense investigator's summary of those records).

plea offer – on the afternoon of the deadline.

Attorney expert Mr. Meryhew's testimony was excluded. His opinions were preserved as an offer of proof (his Declaration was Ex. 13). His Declaration shows that a jail visit of this length is not enough time to adequately explain a plea offer of this significance. Ex. 13, ¶¶38-39.

Finally, Aguirre presented undisputed evidence documenting his PTSD resulting from his service in Iraq, its severity, and its impact on his ability to take in information (Ex. 6); the prescription drugs he was taking to deal with PTSD and their impact (Ex. 7); jail policies documenting the importance of accurate recording of inmate and visitor movements and times (Ex.10); and defense counsel's file, lacking any letter, note, or memo about any transmission of the plea offer to the client and lacking any analysis of the offer, but containing Aguirre's letter saying that he *would* take an offer if his lawyer recommended it (Ex. 17).[3] *See also* VRP:44-45.

B. <u>Defense Trial Counsel Mr. Steele's Memory</u>

On the other hand, Mr. Steele testified that he did transmit the plea offer, even though he had no memory or memorialization of it. *E.g.,* VRP:119, 156-58. He said he knew Aguirre would not take it, because he was "a damn-the-torpedoes, full-speed-ahead kind of guy regarding trial." VRP:147. He said Aguirre never told him anything like he should get a

deal. VRP:149. He reiterated that Aguirre never told him that if he got a plea offer and it was in his best interest, he would take it. *Id.* Critically, he acknowledged that he presented the maximum sentencing exposure after trial as just the SRA standard range. VRP:171-72, 174.[4]

The deputy prosecutor from the trial acknowledged that he never discussed the offer with Aguirre. He did testify, however, that he followed up on it with Steele. VRP:216. A jail representative testified in part that jail records are sometimes mistaken about who visited and for how long. VRP:104. Finally, Ms. Steele, wife of and legal assistant to Mr. Steele, testified that one time, Steele had to rush out to visit Aguirre to talk to him but she did not know what date this was or the topic of this visit. VRP:56.

C. The Reference Hearing Court's Findings

The judge ruled that Steele was more credible than Aguirre. VRP:267; Finding 1.1. He believed that Steele told Aguirre that there was a plea offer carrying a recommendation of 14 months in prison, even if the jail records did not document an attorney-client visit during the relevant time. VRP:259-60; Finding 1.2. He further ruled that Steele adequately explained Aguirre's sentencing exposure to him. Finding 1.3. He stated

---

[3] A list of the defense exhibits admitted into evidence is attached as Appendix C.

[4] To be sure, Steele said he understand the "indeterminate sentencing" process and the role of the ISRB. VRP:177. But when he testified about what he told Aguirre about the maximum he faced, he said it was the SRA standard range. VRP:171-72, 174.

that Steele's advice sufficed because second-degree rape under "determinate-plus" sentencing, RCW 9.94A.507, did not really carry a statutory mandatory maximum sentence of life in prison. VRP:263-64.[5]

The judge acknowledged that Aguirre was not necessarily lying when he denied knowledge of the plea or its significance. He thought that Aguirre probably had trouble grasping what Steele was saying, possibly because it was not what he wanted to hear. VRP:266-67.

III. ISSUES

---

[5] The judge stated, VRP:263-64:

> And let me finally say that I disagree with the way that potential sentence in this case has been framed. I will acknowledge that, Ms. McCloud, there's maybe semantics involve here, but you have said a number of times, "a mandatory life sentence." I don't agree with that characterization.
>
> I believe there is a potential for a life sentence, but it is not mandatory. It's the mandatory maximum, but I will point out that maximum sentences, to anyone that's familiar with the criminal justice system, are often announced in matters that don't include indeterminate sentencing as a possibility.
>
> But in every case when I take a change of me [sic] as a judge, I go over with the defendant what the maximum sentence would be. So often, for a Class B felony, I say the maximum sentence is up to ten years in prison and up to a $20,000 fine. Then I talk about the standard range.
>
> I acknowledge that in an indeterminate sentence the standard range is only the minimum term and a judge would have discretion to sentence anywhere within that standard range, and in this particular case, the judge imposed a sentence of 137 months. That was after the mandatory enhancement for the deadly weapon. But that was the determinate – well, strike that. That was the standard range minimum sentence for an indeterminate sentence, and it's clearly set forth that the maximum could be up to life, and that's set by the [ISRB].
>
> I don't know when that hearing's going to be held, somewhere down the line. I have no doubt that, Ms. McCloud, you would have the opportunity, if you're retained by the family, to speak at such a hearing and advocate for your client.
>
> I don't know whether the State would make a recommendation or not. I've been asked when I was a prosecutor to make some recommendations, and on one occasion, I did. I just say all that to say, while there are potentials here, there is nothing set as to a maximum sentence at this point would be my understanding,

1a. Did the court err in characterizing the maximum sentence that the judge could impose as the SRA standard range, rather than life?

1b. Did the court use that erroneous legal interpretation to minimize the significance of Steele's testimony that he told Aguirre that the maximum sentence he faced was the SRA standard range?

2. Did the court err in excluding expert testimony about the proper standard of practice in this area and about whether Steele met that standard, even if Steele told Aguirre exactly what he claims to have told him?

3. Was the evidence sufficient to support the court's finding that Aguirre failed to prove inadequate transmission of the plea offer, given Steele's admission that he advised Aguirre that his maximum exposure was the SRA standard range?

IV. ARGUMENT

A. <u>The Reference Hearing Judge Erred in Ruling that the Rape Crime Did Not Carry a True Life Sentence</u>

1. *The Reference Hearing Court Ruled That Second-Degree Rape Does Not Carry a Statutory Mandatory Sentence of Life*

The reference hearing court erroneously believed that Mr. Aguirre did not actually face a maximum sentence of life:

---

and that still remains to be seen.

> I believe there is a potential for a life sentence, *but it is not mandatory.* ...
>
> *... there is nothing set as to a maximum sentence at this point would be my understanding, and that still remains to be seen.*"

VRP:263 (emphasis added). In fact, that court believed that the sentencing judge imposed only a minimum sentence, not a maximum, VRP:264:

> I acknowledge that in an indeterminate sentence the standard range is only the minimum term and a judge would have discretion to sentence anywhere within that standard range, and in this particular case, the judge imposed a sentence of 137 months. ....
>
> ...That was the standard range minimum sentence for an indeterminate sentence, and it's clearly set forth that the maximum could be up to life, and that's set by the [ISRB].

2. *Standard of Review*

A trial court's conclusions of law following a reference hearing are reviewed *de novo*.[6] Mixed questions of law and fact are also reviewed *de novo*.[7] Hence, the judge's rulings about what a determinate-plus sentence really is (this Section A) and about how an offer to avoid it can be adequately transmitted (Section B, below) are reviewed *de novo.*

3. *The Reference Hearing Court Erred; the Sentencing Judge Imposed a Mandatory, Statutory, and Real Sentence of Life*

---

[6] *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 873-74, 16 P.3d 601 (2001); *In re Pers. Restraint of Bradford*, 140 Wn. App. 124, 130, 165 P.3d 31 (2007).
[7] *In re Bradford*, 140 Wn. App. 124, 130.

The reference hearing judge misunderstood the mandatory penalty for second-degree rape in several ways. First, he confused the ISRB's role in setting minimum terms for old, pre-SRA, sentences with its role in releasing sex offenders with new "determinate-plus" sentences. He believed the ISRB would set the maximum sentence for Aguirre at a hearing "somewhere down the line." VRP:264. In fact, that maximum was already set by the court at sentencing, as the Judgment shows. It was a *mandatory* maximum under RCW 9.94A.507(3)(b), which says "the court *shall* impose a sentence to a maximum term and a minimum term." (emphasis added). Thus, contrary to the judge's belief, Mr. Aguirre's maximum term had already been set – at life.

The judge also erred in ruling that Aguirre did not receive a true life sentence because input would be solicited from the prosecutor and the judge first.[8] This was true of duration of confinement hearings under old RCW 9.95.116, in which the ISRB reset minimum terms for old indeterminate sentence offenders But it is not true of RCW 9.94A.570(3)(b) determinate-plus sentences. The maximum in determinate-plus cases is imposed at sentencing.[9]

---

[8] VRP:264 ("I don't know whether the State would make a recommendation or not. I've been asked when I was a prosecutor to make some recommendations, and on one occasion, I did.").

[9] The ISRB holds two very different types of hearings – a .100, or paroleability hearing, for pre-SRA offenders and .420, or Community Custody Release hearing, for offenders

The judge's confusion about determinate-plus sentencing was revealed in other comments. He believed Aguirre could get representation at the hearing to determine his maximum sentence – the hearing that does not exist for determinate-plus sentences like Aguirre's.[10] This is not true – attorneys are usually not permitted at determinate-plus sentence ISRB hearings: "[DOC] has determined not to provide lawyers at CCB hearings. To avoid economic discrimination, private attorneys are not allowed."[11]

In other words, the statutory maximum under the determinate-plus law differs from other statutory maxima because it is a sentence that *must* be imposed, not a sentence that *might* be imposed: "RCW 9.94A.712 [now, RCW 9.94A.507] … directs the sentencing judge to impose both a maximum term and a minimum term. The maximum term 'consist[s] of the statutory maximum sentence for the offense,' which for the class A felony of rape in the second degree, is a term of life imprisonment. … *Therefore, the statutory maximum identified in RCW 9.94A.712(3) differs from other statutory maximums because it is mandatory, whereas most*

---

sentenced under RCW 9.94A.507 ("CCB" offenders). The Board uses the .420 hearing to determine whether it is more likely than not that a sex offender will engage in sex offenses if released on conditions. If the Board decides a CCB offender is not releasable, it sets a new *minimum* term, adding up to 60 months to the minimum term. This can be repeated until the offender's maximum term expires. The maximum term remains unchanged. *See* http://www.srb.wa.gov/hearings/prison_hearings.shtml.

[10] VRP:264 ("I have no doubt that, Ms. McCloud, you would have the opportunity, if you're retained by the family, to speak at such a hearing and advocate for your client.").

[11] http://www.srb.wa.gov/hearings/prison_hearings.shtml.

statutory maximums merely establish the outside limit of available sentences." *State v. Clarke*, 156 Wn.2d 880, 887-88, 134 P.3d 188 (2006), *cert. denied*, 552 U.S. 885 (2007) (emphasis added).

Thus, despite the judge's belief that "there is nothing set as to a maximum sentence at this point," VRP:264, there was. It was life in prison. The judge's conclusion on this legal point is wrong.

B. The Court Erred by Using this Erroneous Legal Interpretation to Minimize the Requirement to "Adequately Transmit" the Plea Offer

That error infected the finding: "George Steele did adequately explain to Daniel Aguirre the difference between the sentencing consequences of the plea offer and the potential sentence if he were convicted at trial." CP:221, ¶1.3. It is what caused the reference hearing judge to conclude, "I'm going to find that the offer was adequately explained as to the difference between the plea-offer sentence and the potential sentence if Mr. Aguirre were convicted at a trial, which is what has taken place here." VRP:265; CP:221, ¶1.3.

If the experienced judge was mistaken about the meaning of determinate-plus sentencing, Aguirre could have been confused about that, too, especially without a clear explanation and time for questions and answers. The judge erred by basing his decision about the adequacy of Steele's advice about the plea offer on his erroneous understanding of

determinate-plus sentencing consequences.[12]

C. The Court Abused Its Discretion in Excluding the Testimony of Legal Expert Mr. Meryhew

1. *The Decision Whether to Admit Expert Testimony is Reviewed for Abuse of Discretion*

Exclusion of expert testimony is reviewed for abuse of discretion. *State v. Ortiz*, 119 Wn.2d 294, 310, 831 P.2d 1060 (1992). When a proposed expert is qualified; provides a sufficient offer of proof; and offers relevant testimony that might aid the factfinder, then exclusion constitutes an abuse of discretion.[13]

2. *The Court Abused Its Discretion in Excluding Expert Attorney Testimony, Given the Expert's Undisputed Credentials and the Factfinder's Obvious Confusion on the Relevant Issue*

Exclusion of the expert in this case was an abuse of discretion under this standard. Neither the reference hearing judge nor the state questioned Meryhew's qualifications as an expert. VRP:58 (state's

---

[12] The judge further minimized the requirement to "adequately transmit" the plea offer by concluding that the state's letter transmitting the plea offer explained the terms clearly. VRP:262 ("I think the State in Exhibit No. 2 explained is it as well as anybody can explain it ..."). The judge continued that since he'd already concluded that Steele had conveyed that same offer, Aguirre had received all the information he needed to make an informed decision. *Id.* His finding was based not on any evidence refuting Aguirre's claim that the offer was not explained, but on the contents of the state's letter alone. VRP:263 ("I find that the plea offer does contain all the consequences."). But Aguirre never received that letter – his testimony on that point, VRP:72-73, was undisputed.

[13] *Walker v. Bangs*, 92 Wn.2d 854, 858, 601 P.2d 1279 (1979) (reversing defense judgment in attorney malpractice case and remanding for retrial because trial court excluded proffered attorney expert on standard of attorney practice in the relevant field, there, longshoreman's maritime personal injury claim).

objections); VRP:59-60 (ruling). His testimony was relevant – it would have described the standard of care required of competent counsel when the charges carry a determinate-plus sentence of *life* and the offer is a plea to a crime with a *guaranteed maximum 14-month determinate sentence*. Ex. 13, ¶¶ 33-35. His testimony would also have clarified the impact of the mental disorder PTSD on that standard of care. Ex. 13, ¶ 41.

The judge questioned only whether this would be helpful: "I don't think I need an expert to tell me what an individual needs to be told in a particular case. That's based on my training and experience having worked over 30 years in the criminal law area." VRP:60.

The judge's analysis, however, indicates that he could have used an expert. The judge asked the prosecutor about the procedure for setting a maximum sentence. VRP:250 ("Let me ask you a question about that. When does the [ISRB] review a case to set a maximum sentence?"). The expert could have explained that his maximum term had already been set. He could have explained the procedures for the CCB hearing. He could have explained that according to the June 30, 2010, ISRB Determinate Plus/CCB Statistical Report, the ISRB had conducted 810 release hearings since the law was adopted in 2001; only 38.9% of those hearings resulted in a finding that the offender was "releasable;" 61.1% resulted in a finding

of "not releasable." Ex. 13, ¶30.[14]

Meryhew could also have clarified the impact of PTSD on Steele's duty to transmit the plea offer. In his ruling, the judge acknowledged, "Mr. Aguirre has been diagnosed as having PTSD." VRP:258. Meryhew could have advised the judge:

> Presenting a sentence imposed under the determinate plus scheme as involving a 12-14 month sentence, without further explaining the very real potential for life in prison and/or lifelong supervision for a conviction as charged, is a gross mischaracterization of the offer. Quite a bit more explanation is required, especially if a detailed explanation of determinate-plus sentencing was not provided at the beginning. In any case, it takes far more than seven minutes to provide that explanation.
>
> This is especially true if the defendant is suffering from psychological problems that stand in the way of accessing and digesting such new information – like the extreme stress, anxiety, and PTSD problems from which Mr. Aguirre was being treated … .

Ex. 13, ¶¶40-41. The court abused its discretion in excluding the expert.[15]

---

[14] He would have also explained that, to date, little is known about the factors that influence the ISRB in these sorts of cases. The available data from the ISRB indicates that completion of the in custody Sex Offender Treatment Program is the number one predictor of release, and this program is barred to those who do not admit their guilt. Ex. 13, ¶31. Then, even when a defendant is released from prison by the ISRB, he will continue to be monitored by DOC for the rest of his life and any violation can be grounds for return to prison. This would involve significant restrictions on his life. Thus, if ever released, the defendant is under virtual "life-time parole." Ex. 13, ¶32.

[15] Expert testimony is certainly admissible on the issue of ineffective assistance of counsel, since it is a mixed question of law and fact. *Strickland v. Washington,* 466 U.S. 668, 698, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *In re Personal Restraint of Brett,* 142 Wn.2d 868, 873, 16 P.3d 601 (2001). Washington courts thus admit expert testimony on that issue. *E.g., In re the Personal Restraint of Elmore,* 162 Wn.2d 236, 264, 172 P.3d

D. The Evidence Was Insufficient to Support the Judge's Conclusion that Defense Counsel Adequately Conveyed the Significance of the Offer.

1. *The Trial Court's Findings of Fact are Reviewed for Substantial Evidence*

Findings of *fact* from a reference hearing are reviewed for substantial evidence. *In re Gentry*, 137 Wn.2d 378, 410, 972 P.2d 1250 (1999). But the adequacy of counsel's advice in an ineffective assistance case is a mixed question of fact *and law. Supra,* n.15. And sufficiency of the evidence is a legal question. *Jackson v. Virgina,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The sufficiency of the evidence to support the judge's conclusion Steele adequately conveyed the offer's significance is therefore reviewed *de novo.*

2. *The Evidence was Insufficient to Support the Legal Conclusion that the Trial Lawyer Adequately Conveyed the Offer's Significance*

The judge found Steele's testimony credible. But even if his testimony is fully credited, the information he thinks he provided to Aguirre was materially incorrect.

First, Steele indisputably said: "I would have told him basically he is looking at the standard range, unless aggravating circumstances were alleged or exceptional circumstances to allow – that if found, would allow

---

335 (2007). In fact, the Supreme Court found just this sort of expert testimony persuasive

the judge to go above the standard range." VRP:176. As discussed in Section A above, this is incorrect – Aguirre faced, and received, life. Under controlling authority, this misadvice constitutes ineffective assistance.[16]

Further, Steele testified that he did not advise Aguirre in detail about the pros and cons of the offer.[17] Under controlling authority, this also constitutes ineffective assistance.[18]

There was disputed evidence about the time that Steele could have devoted to explaining the meaning of the plea offer sentence, as compared

---

in a reference hearing in a similar ineffective assistance case. *In re Brett,* 142 Wn.2d 868.

[16] To provide effective assistance, defense counsel must transmit all plea offers. *State v. James*, 48 Wn. App. 353, 362, 739 P.2d 1161 (1987). Defense counsel must also provide the defendant *with correct advice about the consequences of a guilty plea* and enough information to "assist[] the defendant in making an informed decision as to whether to plead guilty or to proceed to trial." *State v. A.N.J.*, 168 Wn.2d 91, 111, 225 P.3d 956 (2010).

[17] VRP:157 ("I normally don't do a written analysis to the pros and cons of an offer, ..."); VRP:173 ("[M]y recollection is and my understanding would be that my advice would have been somewhat equivocal ..."); VRP:176 ("I explained the offer and what he was looking at if he took the deal and what he would be at if he chose not to and wound up getting acquitted. I also would have told him, if he went to trial and won, there wouldn't be anything going on as far as supervision or anything else."); VRP:179 ("I would have advised him ... this is a case where it's reasonable for him to accept the offer, it's also reasonable for him to reject it. I would have advised him again that this would have had serious consequences as to his ability to stay in the military ....").

[18] *In re Personal Restraint of McCready*, 100 Wn. App. 259, 263, 996 P.2d 658 (2000) ("[defense counsel] had to provide [client] with sufficient information to make an informed decision on whether or not to plead guilty. ... *Because counsel did not inform Mr. McCready of the maximum and minimum sentences that could be imposed for the offenses charged by the State, he did not make an informed decision regarding the plea offer.* ... Counsel testified at the reference hearing that he did not discuss with Mr. McCready the fact the charges subjected him to two, consecutive, five-year, mandatory minimum sentences.") (citations omitted) (emphasis added).

to the sentencing exposure at trial.[19] The judge surmised that Steele could have advised Aguirre of the offer during a time other than the documented attorney-client meeting, *i.e.,* when Aguirre was out of his cell for 20 minutes on November 30 for "video court." VRP:260. The logs also show that Aguirre was out of his cell for 6 minutes on November 20 for an attorney visit for which a corresponding visitor could not be identified (though Aguirre had other legal issues, concerning his marriage, occurring at this time). Giving Steele the benefit of the doubt – that he was the "missing" visitor for the 6-minute visit, and that he was able to advise Aguirre during 20 minutes in "video court" – that gave Steele at most 6 + 20 + 7 or 33 minutes with Aguirre while the offer was pending, including a 20-minute public court appearance. Twenty-seven of those minutes were on the last day the offer was open – acceptance was due, in writing, by 5:00 p.m. Ex. 2. Only 7 of those minutes were for the Steele-Aguirre attorney-client visit. And comparing the time that Aguirre was out of his cell and the time Steele was in the jail for that visit, the logs have their actual face-to-face time at 3 minutes, not 7.[20] So, even crediting Steele's

[19] The judge dismissed the jail's internal management procedures regarding security and control of its inmates – the "Backpost Activity Log", Ex. 14 – as likely incorrect. VRP:259. Yet those logs are the means by which the jail accounts for the movements of its inmates, and keeps count to maintain security. Ex. 10. The logs show every time Aguirre was removed from his cell, whether it was for an hour "out" time, to medical, to visiting, or trips to court.

[20] On Nov. 30, 2006, the last day the offer was open, Steele entered the jail at 3:30 p.m.

testimony fully, this is insufficient time to provide counsel on the significance of the plea offer versus sentencing exposure that not even the reference judge seems to have understood.[21]

The trial lawyer depended on his memory when testifying that he transmitted the offer. VRP:158. But his memory was unreliable. Most notably, he remembered that Aguirre was always adamant about not pleading guilty: "[Aguirre] was not about to plead to anything where he would have to admit that he did do … these crimes. Nor did he make any requests that I can recall trying to see if we could work about a better deal or anything like that. He was very much he was going to go to trial." VRP:119-20. This ignores Aguirre's letter saying just the opposite.

The evidence is thus undisputed that Steele did not tell Aguirre that if he turned down the plea offer, he was exposed to a real sentence of life in prison. The evidence is undisputed that Steele (like the judge) believed that Aguirre faced a sentence of only the standard SRA range. The evidence is

---

He exited at 3:37 p.m. Ex. 11, p. 7. Aguirre was out of his cell for 6 partially overlapping minutes. With the time it takes to get the attorney into the visiting room, and the inmate out of his cell and into the visiting room, and then to get the attorney through the locked doors and out again to sign out, the actual time the two spent together could have been no more than 3 minutes. VRP:28-29.

[21] The judge also dismissed the importance of the letter from Aguirre in Mr. Steele's own file stating that "So just know if you get a deal sometime between now and trial and you feel its [sic] in my best intrest [sic] to take it, I will." Ex. 17, Appendix A. The letter, undated, is found with other documents in the file dated November, 2006. It does not refer to any particular plea offer, past or present. Aguirre does not place any conditions on "in my best interest." Aguirre does *not* say "as long as I can stay in the military."

disputed about whether Steele conveyed the plea offer, but undisputed that he did not do it by mail, he did not do it by phone, he did not record when he did it in his file, and he did not show the actual letter to Aguirre.[22] The evidence is disputed about where and when Steele conveyed the plea offer, but undisputed that it could not have taken him very long.

The judge therefore erred in finding that there was insufficient evidence to prove that Mr. Steele failed to adequately explain the offer. Even if all of Mr. Steele's assertions are fully credited, that alone provided sufficient evidence.

V. CONCLUSION

For the foregoing reasons, this Court should grant the PRP.

DATED this 8th day of December, 2011.

Respectfully submitted,

Sheryl Gordon McCloud, WSBA No. 16709
Attorney for Appellant, Daniel Aguirre

[22] The trial lawyer testified that "anything" he did on the case should be in that file. VRP:156. Yet there was no cover letting indicating the plea offer was mailed or hand delivered to Aguirre; there was no message slip showing that Steele had a phone conversation with Aguirre about the plea offer; there was no note or memo memorializing a meeting with Aguirre about the plea offer; there was no written analysis about the pros and cons of the plea offer; and there was no letter to Aguirre explaining the pros and cons of the offer. In sum, there was no memorialization of any kind in the file regarding transmittal of the plea offer to Mr. Aguirre. VRP:156-57.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 8th day of December, 2011, a copy of the SUPPLEMENTAL REFERENCE HEARING BRIEF was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

Carol LaVerne
Thurston County Prosecutor
2000 Lakeridge Dr. SW, Bldg 2
Olympia, WA 98502-6090

Daniel Aguirre
DOC # 303570
Stafford Creek Correctional Center
191 Constantine Way
Aberdeen, WA 98520

Sheryl Gordon McCloud

APPENDIX A

Mr Steele

There are acouple things I am sure I've told you but wanted to write and tell you just in case I am not sure if you can use any of it or not.

1. The night In question I was pulled over in tacoma. I was let go

2. There are several subject matter experts on ft lewis in combatives that could atleast to the bruising been such with "breaking the guard"

3. She left one of the MPs "How to strike diogram at my house we were looking at it the still there.

4 one of the soldiers who had sex as grople was another MP SGT King

5. everytime she called me after that I called either my PLT sgt or 1SG kelly no matter what time it was and told them.

6. she said she had an abortion in PA

7. I called her cell phone when she was in PA and her boyfriend answered he told me who he was And I told him who I was.

7. Miyzano has seen us wrestling in the feild

8. A SGT Steven Snyder I am all most sure he saw the knife in my office the day we got the truck stuck.

9. And maybe a SSG Steve Davis
C 253-882-9438
H-253-446-0840
it was inbeetwen my tomahawks under my dads picture

10. And that mourning and in the feild she had made the comment Feild: "looks like Ive got beat up" Mourning- My Chain of Command is going to think you beat me, Miyzano was there in the mourning and king and lolofer I think were there in the feild.

Well I not sure if any of this helps but I am trying to think of everything. Many times I held my soliders lives in my hand and they lived or died by the way I preformed. It is a odd feeling having now my life in someones elses hands. There is not a question in my mind you are a great Attorney (and would have been a also great solider) but like you said anything can happen. So Just know if you get a deal sometime between now and trial and you feel it's in my best intrest to take it, I will if not than Just as my soliders followed me into battle I'll follow you to trial thank you for all your hard work

Daniel Aguirre

PS hope that cough goes away.

APPENDIX B

Thurston County Jail Visiting and Activity Chart for Daniel Aguirre (November 1 – November 30, 2006)

Date	Jail visitation as viewed by Sanderson	Reception Visitation logs from Vickie Wilson via PDR	BAC room visitation log	Backpost activity log for F	Court	Jail medical
Nov 1						DA seen at jail medical multiple times today; describes PTSD, to start new psych meds [DA's med records, progress notes starting 11/1/06]
Nov 9	George Steele visits DA at the Thurston County jail in booth 18 from 9:00 – 9:11 am [Reviewed jail logs in person on 3/13/08]	George Steele visits with DA – checked in at 9:00 and checked out at 9:11 am		DA removed from cell for A/V – 903am – 911am	Hearing continued: stipulated Pretrial/omnibus [court docket from 11/9/06]	
Nov 12		George Steele visits with DA at the jail in booth 16 from 1528 – 1548 Calvin Ray visits DA at jail visiting from 1550 - 1610		DA removed from cell at 1432 – 1550 for an hour out 1530 – 1547 – DA to A/V 1547 – 1612 – DA to visit 1615 – 1625 – DA to use phone		
Nov 13						
Nov 15	George Steele visits Trevor Bowman in booth 16 from 10:10 – 10:40 am [Reviewed jail logs in person on 3/13/08]					
Nov 16	George Steele visits DA at the jail in booth 17 from 10:09 – 10:15 am [Reviewed jail logs in person on 3/13/08]	George Steele visits with DA from 10:09 – 10:15am		1010 – 1014 – DA to A/V	Cancelled: Plaintiff/pros requested State's list of witnesses Notice of Hearing Pretrial / Bail Review [court docket from 11/16/06]	
Nov 17						
Nov 19		Calvin Ray visits DA 1519 -		DA to visitation 1522 - 1539		
Nov 20	George Steele visits Charles Jalek in booth 17 from 13:43-13:43 (1:43pm) [Reviewed jail logs in person on 3/13/08]			DA to medical 1057 – 1121 DA to A/V 1540 – 1546? (time is unclear)		DA seen by medical; DA complains that medications are still not working; reference to adding new meds [DA's med records from jail, progress notes starting on 11/19/06]
Nov 21	George Steele visits Trevor					

Date	Jail visitation as viewed by Sanderson	Reception Visitation logs from Vickie Wilson via PDR	BAC room visitation log	Backpost activity log for F	Court	Jail medical
	Bowman in booth 4 from 1526-1540 (3:26-3:40pm) [Reviewed jail logs in person on 3/13/08]					
Nov 22	Private Investigator John Wilson visits two inmates, Alden Yale and Daniel Aguirre from 9:49 – 11:06am (total time for both visits) [Reviewed jail logs in person on 3/13/08]			DA to A/V 1030 – 1105am DA to sick 1340 - 1450	Notice of hearing Review release conditions 1:30pm Hearing continued: Calendar conflict Review release conditions Hearing Cancelled: court's request [court docket from 11/22/06]	1:50pm DA is seen by medical, starting on new medication [DA's medical records from jail, progress notes starting on 11/19/06]
Nov 24			Attorney Steel to see "Britton" – in at 2024 and out at 2100			
Nov 26		Calvin Ray visits DA from 1542 – 1604		DA to visiting 1543 – 160_		
Nov 28		David Kauffman attends video court 1320 - 1455		DA to A/V at 1441 to 1445 (this is from the undated logbook)		
	George Steele visits Trevor Bowman from 1607-1626 (4:07-4:26pm) [Reviewed jail logs in person on 3/13/08]	George Steele visits Trevor Bowman from 1607 – 1626				
Nov 29	George Steele visits Trevor Bowman in booth 18 from 1303-1415 (1:03 – 2:15pm) [Reviewed jail logs in person on 3/13/08]					
Nov 30	Private Investigator John Wilson visits DA from 10:57-11:25am [Reviewed jail logs in person on 3/13/08]	PI investigator John Wilson visits DA from 1057 - 1125		DA to A/V at 1122am		
	George Steele attends court at the jail "video" from 1451-1508 (2:51-3:08pm) [Reviewed jail logs in person on 3/13/08]	George Steele visits video court from 1451 - 1508		DA to A/V at 1450 - 1510	Hearing continued: stipulated [court docket from 11/30/06]	
	George Steele visits DA in booth 6 from 1530-1537 (3:30-3:37pm) [Reviewed jail logs in person on 3/13/08]	George Steele visits DA from 1530 - 1537		DA to A/V 1534 - 1540		

APPENDIX C

APPENDIX C –Defense Exhibits Admitted into Evidence

Ex. No.	Description	Admitted
2	Deputy Prosecutor Mr. John Skinder's 11/17/06 letter to Mr. Steele and plea offer. (PRP App. B).	7/18/11 VRP:94
7	Thurston County Jail records concerning Mr. Aguirre's health and psychological problems during his incarceration. (PRP Apps. T, V, AA).	7/18/11 VRP:94
9	Cover letter from Thurston County Sheriff's Office transmitting jail policies and visitation logbooks.	7/18/11 VRP:19
10	CERTIFIED copies from Thurston County Sheriff's Office of (1) Jail Policy: Procedures for Visitation; (2) Jail Policy: Log Documentation and Pass-On Briefing; and (3) Thurston County Corrections Facility Public Information Sheet.	7/18/11 VRP:19
11	CERTIFIED copies of Thurston County Jail Reception, Visitation, and Master Control logbooks.	7/18/11 VRP:13
12	Attorney Retainer and Fee Agreement signed by Daniel Aguirre and George A. Steele.	7/18/11 VRP:53
14	Backpost Activity Log.	7/18/11 VRP:16
15	Summary Chart of Jail Records.	7/18/11 VRP:29
17	Second set of materials received from George A. Steele's office; received June 18, 2007.	7/18/11 VRP:33